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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of:

Court Remand of August 1998 Advanced  
Services Order

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CC Docket Nos. 98-11, 98-26,  
98-32, 98-91, 98-147

COMMENTS OF GTE

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## Table of Contents

I. INTRODUCTION AND SUMMARY .....	2
II. RESPONSE TO THE QUESTIONS ON REMAND.....	5
A. xDSL Services Are Information Access, Not Telephone Exchange Service or Exchange Access (Questions 1-3).....	5
1. xDSL-based advanced services are not “telephone exchange service.” .....	6
2. xDSL-based advanced services are “information access,” not “exchange access.” .....	8
B. Advanced Services Are Not Subject to Discounted Resale Pursuant to Section 251(c)(4) (Question 4).....	11
III. CONCLUSION.....	15

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GTE Service Corporation and its below-listed affiliates (collectively, "GTE")<sup>1</sup> respectfully respond below to the Commission's Public Notice<sup>2</sup> requesting comment on certain issues raised by the voluntary remand of the August 1998 Advanced Services Order.<sup>3</sup> For the reasons discussed herein, GTE supports U S West's arguments that xDSL-based advanced services are "information access," not "exchange service" or "exchange access." Regardless of whether the Commission concurs with this conclusion, however, neither the Communications Act nor sound policy permits it to require ILECs to offer discounted resale of their advanced services.

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<sup>1</sup> GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, Contel of the South, Inc., GTE Communications Corporation, GTE Internetworking, and GTE Wireless Incorporated.

<sup>2</sup> "Comments Requested In Connection With Court Remand of August 1998 Advanced Services Order," DA 99-1853 (Sept. 9, 1999).

<sup>3</sup> Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998).

## I. INTRODUCTION AND SUMMARY

In its Advanced Services Order, the Commission properly found that “incumbent wireline carriers and new entrants are at the early stages of deploying xDSL and other advanced services,” and that, consequently, “the incumbent [LEC] does not currently enjoy the overwhelming market power that it possesses in the conventional circuit-switched voice telephony market.”<sup>4</sup> Notwithstanding this conclusion, the Commission denied several ILEC petitions that sought to assure that ILECs and CLECs could provide advanced services under the same competitive ground rules. One of those petitions, filed by U S West, argued that advanced services are neither “exchange service” nor “exchange access,” and therefore are not subject to the obligations imposed on ILECs by Section 251(c). The Commission summarily rejected this contention, stating simply that “advanced services offered by incumbent LECs are either ‘telephone exchange service’ or ‘exchange access.’”<sup>5</sup>

U S West appealed, arguing that the Advanced Services Order unlawfully extends ILEC regulation to advanced services.<sup>6</sup> The Commission then filed a motion for voluntary remand, suggesting that U S West had presented its arguments to the agency only “in truncated form” and had “masked their significance.” U S West agreed

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<sup>4</sup> *Id.*, 13 FCC Rcd at 24017 (¶ 10).

<sup>5</sup> *Id.*, 13 FCC Rcd at 24032 (¶ 40).

<sup>6</sup> Brief of Petitioner U S West Communications, Inc., *U S West Communications, Inc. v. FCC*, No. 98-1410 (D.C. Cir. filed May 17, 1999). GTE intervened in support of U S West. See Motion of GTE Service Corporation and its Affiliates for Leave to Intervene Out-of-Time, No. 98-1410 (D.C. Cir. Oct. 22, 1998).

that a remand was appropriate, although it objected to the Commission's characterization of its pleadings. On August 25, the D.C. Circuit granted the Commission's motion.

As a leading provider of xDSL services, GTE has a strong interest in this proceeding. Almost one year ago, the Commission issued an Order validating GTE's decision to tariff ADSL at the federal level as an interstate access service.<sup>7</sup> GTE now provides more than 30,000 ADSL lines., which are used in conjunction with Internet access services provided by Internet service providers (ISPs) in order to afford the ISPs' customers with high-speed access to the World Wide Web.

As discussed below, there are compelling legal arguments, under both the statute and Commission precedent, that ADSL and similar advanced services are "information access," not "exchange access" or "telephone exchange service." A "local exchange carrier" is defined as an entity providing exchange access or telephone exchange service. Accordingly, an entity providing ADSL is not a local exchange carrier, and not subject to LEC or ILEC obligations, with respect to that service (even if it also offers exchange access or telephone exchange service).

These are not merely academic issues. As the Commission just commendably recognized, eliminating burdens on ILEC deployment of advanced services will enhance investment incentives and maximize the availability of these valuable

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<sup>7</sup> GTE Telephone Operating Cos., GTOC Tariff No. 1, 13 FCC Rcd 22466 (1998) ("GTE ADSL Order").

offerings.<sup>8</sup> Declining to impose a facilities unbundling requirement on xDSL equipment thus is a vital step toward realizing Congress's goals under Section 706 of the Act. The Commission should build on this good start by holding that Section 251(c)(4) does not obligate ILECs to offer advanced services at a wholesale discount. Importantly, while agreement with U S West's statutory analysis would compel such action, the Act dictates this result even if the Commission concluded (contrary to law) that advanced services are exchange access or exchange service. Advanced services are simply a means of affording high-speed access to the Internet (or to other applications) rather than retail products themselves. Indeed, the clear trend is for these services to be purchased by information service providers, so that they can offer high-speed access as part of their end-to-end Internet service. In addition, at least some advanced services may be purchased predominantly by telecommunications carriers. For these independent reasons, advanced services are not subject to the wholesale discount regardless of their regulatory classification.

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<sup>8</sup> See News Release, "FCC Promotes Local Telecommunications Competition," Sept. 15, 1999 ("Given the nascent nature of [the advanced services] market and the desire of the Commission to do nothing to discourage the rapid deployment of advanced services, the Commission declined to impose an obligation on incumbents to provide unbundled access to packet switching or DSLAMs at this time.") ("UNE Remand News Release").

## II. RESPONSE TO THE QUESTIONS ON REMAND

### A. xDSL Services Are Information Access, Not Telephone Exchange Service or Exchange Access (Questions 1-3).

The first question in the Public Notice asks whether xDSL services can be considered either telephone exchange service or exchange access. Relatedly, the second question inquires about the legal significance of the 1996 Act's expansion of the definition of "telephone exchange service" to include "comparable service provided through a system of switches, transmission equipment or other facilities ... by which a subscriber can originate and terminate a telecommunications service." The third question seeks comment on the relationship between the terms, information access, exchange access, and telephone exchange services, and asks whether these categories of services are mutually exclusive. As detailed below, xDSL-based advanced services are neither "telephone exchange service" nor "exchange access"; they are "information access."<sup>9</sup> (Attachment A to these comments is a taxonomy of telecommunications services that depicts the relationship among these various offerings.)

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<sup>9</sup> As a preliminary matter, it is not even correct that all advanced services are telecommunications services, contrary to the Advanced Services Order. See 13 FCC Rcd at 24029 (¶ 35). Some advanced services – both current and future – may involve the capability to process, acquire, utilize, or make available information, and therefore be information services, see 47 U.S.C. § 153(20), or may more appropriately be considered cable services. See *id.*, §§ 522(6), 571(b). It is therefore premature and overbroad to conclude that all xDSL-based advanced services are telecommunications services. Those that are not are disqualified at the starting gate from being telephone exchange services or exchange access.

**1. xDSL-based advanced services are not “telephone exchange service.”**

The Act defines “telephone exchange service” as “(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or a combination thereof) by which a subscriber can originate and terminate a telecommunications service.”<sup>10</sup> As U S West demonstrated in its brief, “telephone exchange service” is “basic local calling service – what a customer receives for paying his or her basic monthly charge ....”<sup>11</sup> That is, telephone exchange service is the functionality that permits any subscriber in a local exchange area to reach any other subscriber in that area without incurring a toll charge. This is fully consistent with the Commission’s longstanding interpretation of “telephone exchange service” to mean “the provision of individual two-way voice communication by means of a central switching complex to interconnect all subscribers within a geographic area.”<sup>12</sup>

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<sup>10</sup> 47 U.S.C. § 153(47).

<sup>11</sup> U S West Brief at 5; *see also id.* at 17-23.

<sup>12</sup> Application of Midwest Corp., 53 F.C.C.2d 294, 300 (1975). As U S West notes, the FCC has held that Congress intended to ratify the agency’s longstanding interpretation of the first clause of the definition by retaining the pre-existing statutory language unchanged in the 1996 Act. U S West Brief at 18, *citing* Application of BellSouth, 13 FCC Rcd 20599, 20621 & n.64 (1998).



xDSL services plainly do not offer the same functionality as basic local calling service. In fact, "Internet-bound DSL communications do not stay within a local exchange and do not transit or interconnect with the local exchange network; moreover, DSL does not provide universal local connectivity and is not included in a subscriber's basic local calling charge."<sup>13</sup> Rather, as GTE has explained in relation to its own ADSL offering:

GTE's ADSL offering is ... an interstate service that provides a high-speed access connection between an end user and the Internet by utilizing a combination of the end user's existing local exchange physical plant (*i.e.* copper facility), specialized ADSL equipment and transport to a frame relay switch where the ISP connects to GTE's network.<sup>14</sup>

GTE's ADSL service does not provide "any-to-any" connectivity; it is marketed predominantly to ISPs, which in turn incorporate it into their Internet access offerings sold to individual end users. While end users can order the service themselves, any end user doing so "would still have to connect the service through an ISP to the Internet, or it would have connectivity to nowhere."<sup>15</sup> Finally, GTE's ADSL service is offered for an additional fee; it is not included in the basic charge for local telephone service.

The fact that Congress expanded the definition of "telephone exchange service" to include "comparable" service does not suggest that it intended to expand the type of functionality, as opposed to the type of technology, included within the definition. As

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<sup>13</sup> U S West Brief at 15.

<sup>14</sup> GTE Direct Case, CC Docket No. 98-79, filed Sept. 8, 1998, at 4 (footnotes omitted).

<sup>15</sup> *Id.* at 4 n.8.

Congress is well aware, network technologies change over time. To the extent these new technologies are employed to permit any subscriber in an exchange area to communicate with any other subscriber in that area for the basic exchange charge, the carrier is providing a "telephone exchange service."

The "comparable" qualification in the second clause of the definition therefore refers to the type of service being provided; it does not limit the provision of telephone exchange service to a particular technology.<sup>16</sup> Consequently, the Commission cannot legitimately use the second clause to capture services, such as xDSL-based advanced services, that fail to provide equivalent functionality to traditional telephone exchange service.

**2. xDSL-based advanced services are "information access," not "exchange access."**

The Commission's Rules define "access service" to include "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."<sup>17</sup> Based on this definition, the Commission properly determined that GTE's ADSL offering is an access service that should be tariffed at the federal level. Importantly, however, the Commission did not determine that GTE's ADSL

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<sup>16</sup> The Advanced Services Order (13 FCC Rcd at 24032 (¶ 41)) suggests that U S West contended that the "comparable" requirement is meant to limit telephone exchange service to a particular technology. This plainly misconstrues U S West's argument. See U S West Brief at 23-24.

<sup>17</sup> 47 C.F.R. § 69.2(b) (1998).

offering was “exchange access.” Neither GTE’s ADSL offering, nor any other advanced service used for Internet access, falls into that category.

Under the Act, “exchange access” means “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.”<sup>18</sup> In turn, “telephone toll service” means “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.”<sup>19</sup>

Comparing the statutory definition of “exchange access” with the rule defining “access service,” it is clear that (1) exchange access is a subset of access service, but (2) not all access service is exchange access. Access provided to carriers offering telephone toll service – that is, basic phone-to-phone long distance telecommunications (whether voice or data) – is exchange access.<sup>20</sup> In contrast, as the Commission has recognized, access that is provided to non-telecommunications carriers such as ISPs – whether it is offered through xDSL, dial-up access or other means – is information access, not exchange access.<sup>21</sup>

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<sup>18</sup> 47 U.S.C. § 153(16).

<sup>19</sup> *Id.* § 153(48).

<sup>20</sup> See U S West Brief at 28.

<sup>21</sup> See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd 21905, 22024 (1996) (¶ 248) (“[T]elephone toll service’ is a ‘telecommunications service.’ Therefore, by definition, an entity that uses ‘exchange access’ is a telecommunications carrier. Because ISPs do not provide telephone toll services, and therefore are not telecommunications carriers, they are not eligible to obtain exchange access pursuant to section 272(e)(2).”)

Section 251(g) of the Act confirms that information access is not included within the definition of “exchange access.” That section retains pre-existing equal access and nondiscrimination obligations for LECs offering wireline “exchange access, information access, and exchange services.”<sup>22</sup> Congress’s use of the separate terms, exchange access and information access, indicates that they encompass different services.<sup>23</sup> Exchange access services are those falling within the statutory definition. Information access services are those meeting the MFJ’s longstanding definition of that term.<sup>24</sup> Therefore, information access services cannot be telephone exchange or exchange access services. These terms are mutually exclusive.

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<sup>22</sup> 47 U.S.C. § 251(g).

<sup>23</sup> See, e.g., *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11<sup>th</sup> Cir. 1991) (“A basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage.”); *Taracorp, Inc. v. NL Industries, Inc.*, 73 F.3d 738, 734 (7<sup>th</sup> Cir. 1996) (“we assume that the same words have the same meaning in a given act and that the choice of substantially different words to address analogous issues signifies a different approach.”). Likewise, the separate itemization of “exchange services” and “exchange access” confirms that exchange access is not merely a subset of exchange services (*cf.* Question 3); if it were, the reference to exchange access would be unnecessary. Indeed, the Commission itself has recognized that exchange access and telephone exchange services are separate categories of services. See *Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15594-95 (1996) (¶¶ 184-185) (treating local exchange service and exchange access as separate services when determining classes of entities entitled to interconnect with ILECs under Section 251(c)).

<sup>24</sup> See MFJ, § IV.I, *United States v. Western Elec. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982). In citing to this definition, the Commission has stated that “exchange access is used in connection with interexchange telecommunications while information access is used in connection with information services.” *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22024 n.621.

**B. Advanced Services Are Not Subject to Discounted Resale Pursuant to Section 251(c)(4) (Question 4).**

In Question 4, the Commission asks whether Section 251(c) applies “to all telecommunications services and facilities offered by an incumbent LEC regardless of whether the services or related facilities constitute telephone exchange service or exchange access.” The apparent intent of this question is to determine whether advanced services offered by an entity that also acts as an ILEC can be subject to Section 251(c) obligations. In light of the Commission’s decision not to require ILECs to unbundle advanced services equipment, this issue is of greatest consequence with respect to the discounted resale requirement of Section 251(c)(4).

GTE agrees with U S West that advanced services offered by an entity that is also an ILEC are not subject to Section 251(c). The Commission need not reach this issue, however, in order to conclude that advanced services are not subject to a mandatory wholesale discount. Even assuming, for the sake of argument, that any telecommunications service offered by an ILEC is potentially governed by Section 251(c), the plain language of Section 251(c)(4) excludes advanced services from the discount requirement.

Specifically, that provision requires an ILEC to “offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”<sup>25</sup> Thus, in order to be subject to the § 251(c)(4)

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<sup>25</sup> 47 U.S.C. § 251(c)(4)(A).

resale obligation, a telecommunications service must be provided both: (1) “at retail;” and (2) “to subscribers who are not telecommunications carriers.”<sup>26</sup>

Advanced services do not meet either criterion. First in determining if a service is “retail,” the Commission must look at the intended use of the service. If the service is an integral production input to the service that ultimately will be offered to an end user subscriber, it is a wholesale product and thus not subject to discounted resale.

xDSL services clearly fall into this category of wholesale services. They are simply a means of affording high-speed access to the Internet (or to other applications). Indeed, the clear trend is for these services to be purchased by information service providers so that they can offer high-speed access as part of their end-to-end Internet service.<sup>27</sup> Thus, because the access capability is simply an input into a retail Internet service, it is a wholesale offering.

Second, at least some advanced services likely will not be provided predominantly to “subscribers who are not telecommunications carriers.” The Commission cannot decide, before the fact, that all advanced services now and in the future will be provided principally to non-telecommunications carriers. Advanced

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<sup>26</sup> *Id.*

<sup>27</sup> GTE and other ILECs include attractive volume discounts in their ADSL tariffs for the express purpose of attracting ISPs, who purchase the advanced services in bulk and incorporate them into their Internet access offerings. See, e.g., GTE Telephone Operating Companies, Tariff FCC No. 1, Sections 16.6.H.3, 18.7.H.3 (term and volume plans for GTE DSL Solutions); Bell Atlantic Telephone Companies Tariff FCC No. 1, Section 16.8.G.2 (volume and term discount plan for Infospeed DSL); Southwestern Bell Telephone Companies Tariff FCC No. 73, Section 14.7.4.A; BellSouth Telecommunications, Inc. Tariff FCC No. 1, Section 7.5.21(A).

services can be used to provide a wide range of service offerings, including high-speed access to the Internet as well as IP telephony.<sup>28</sup> The Commission already has been asked to determine whether IP telephony, under certain circumstances, is a telecommunications service.<sup>29</sup> If so, then xDSL used as part of an IP telephony offering would be provided to a telecommunications carrier, and therefore exempt from the wholesale discount.

If the Commission nonetheless determined that the resale discount may theoretically apply to some advanced services, it should nevertheless forbear from enforcing this requirement.<sup>30</sup> Forbearance is authorized because the requirements of Section 251(c)(4) "have been fully implemented": GTE already makes available all of its retail telecommunications services for resale on a nondiscriminatory basis.<sup>31</sup> Moreover, the three criteria of Section 10 are satisfied. First, continued enforcement of the resale discount requirement is unnecessary to ensure that rates for advanced services are just and reasonable. ILECs face tremendous competition from both

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<sup>28</sup> See Report to Congress, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 98-67 (rel. Apr. 10, 1998).

<sup>29</sup> See Petition of U S West for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony, File No. \_\_\_\_\_ (filed April 5, 1999).

<sup>30</sup> Section 10 of the 1996 Act requires the Commission to forbear from applying any statutory provision if the agency determines that: (1) enforcement is not necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. 47 U.S.C. § 160(a).

<sup>31</sup> See 47 U.S.C. § 160(d) ("the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented.").

CLECs and cable modem service in providing advanced services, and recent marketplace developments confirm that xDSL rates are under severe pressure.<sup>32</sup>

Second, forbearance from imposing the resale discount obligation on ILECs would not harm consumers. To the contrary, as the Commission recognized in declining to mandate unbundled access to advanced services equipment, consumers would reap significant benefits from reduced regulation as competitive market forces expedite deployment of advanced services to the public.<sup>33</sup>

Finally, public policy favors forbearance from requiring ILECs to offer advanced services at a wholesale discount. The FCC's proposal would force ILECs to give competitors significant cost breaks for non-bottleneck services, thereby inhibiting investment and innovation for incumbents and competitors alike. Why would an ILEC invest the time, capital, and other resources to develop new service offerings, if it must turn around and offer them to CLECs at fire sale prices? Furthermore, why would a CLEC invest in research and development and expend resources on creating new advanced telecommunications products and services, if it can buy them at artificially low rates from ILECs? Forbearance is therefore unquestionably warranted.

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<sup>32</sup> See "U S West Reduces Internet Access Price," New York Times, Sept. 16, 1999, at C23 (U S West is "dropping the price of high-speed Internet access by a third" and is "moving to counter the threat of cable modems, which promise even faster Internet access, as well as unprecedented competition in its local-phone business.").

<sup>33</sup> See UNE Remand News Release.



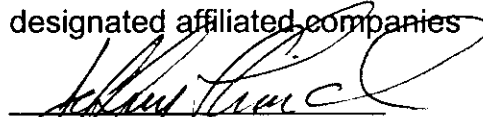
### III. CONCLUSION

The Act and Commission precedent confirm that xDSL-based advanced services are information access, not exchange access or telephone exchange services. Accordingly, to the extent an entity provides advanced services, it is not a "local exchange carrier," even if it also provides exchange access or telephone exchange services. In any event, regardless of whether the Commission agrees with this analysis, advanced services offered by an entity that is also an ILEC are not subject to the mandatory wholesale discount imposed by Section 251(c)(4).

Respectfully submitted,

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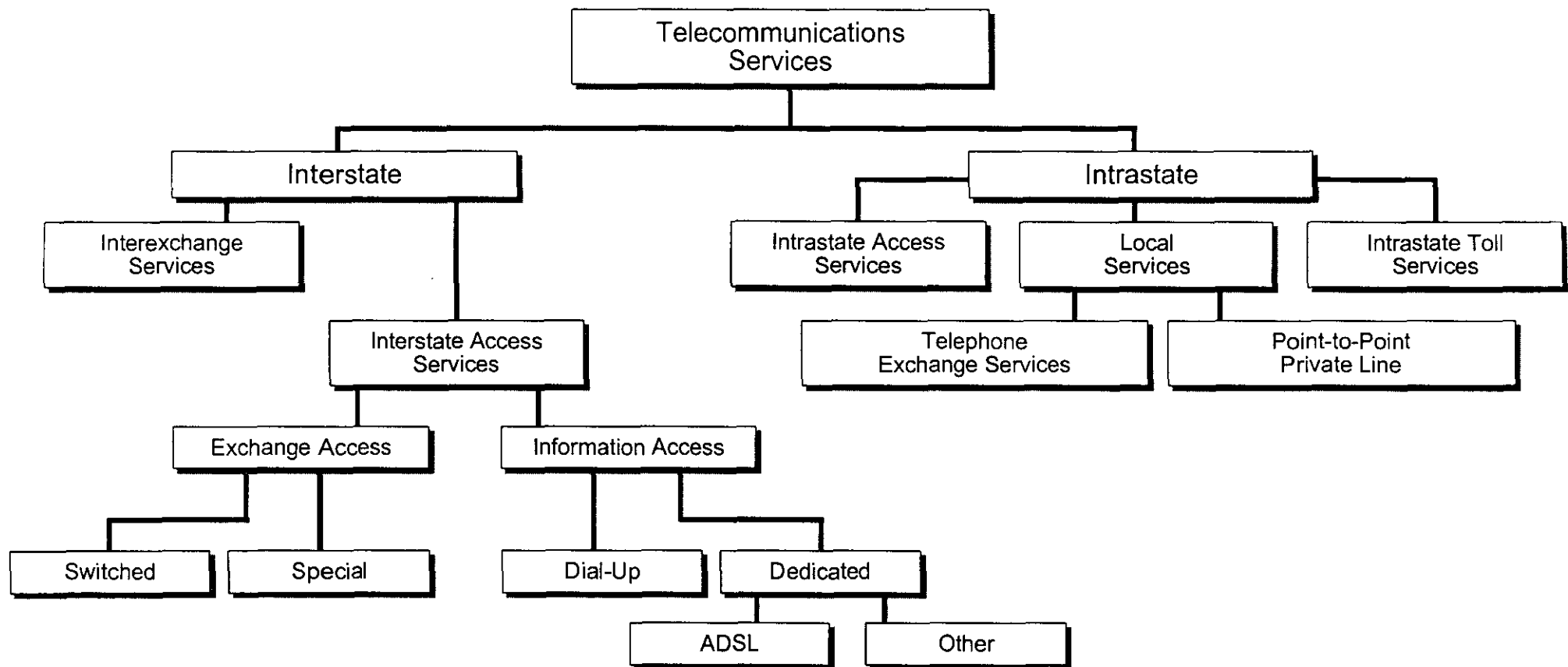
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## CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 24<sup>th</sup> day of September, 1999, I caused copies of the foregoing attached Comments of GTE to be sent via hand-delivery or via first-class mail, postage pre-paid to the following:

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